United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1269

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1269

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

HERBERT SPERLING,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1269

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERBERT SPERLING,

Defendant.

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

Preliminary Statement

The United States of America respectfully petitions for rehearing of the opinion of a panel of this Court (Waterman, *J.*, Motley, *D.J.* of the Southern District of New York sitting by designation) (Van Graafeiland, *J.*, dissenting) filed June 13, 1977, vacating Herbert Sperling's sentence on Count One, the conspiracy count, on the grounds that the sentence constituted multiple punishment in violation of the Double Jeopardy clause. *United States* v. *Sperling*, Dkt. No. 76-1269, slip op. 4139 (2d Cir. June 13, 1977).

Statement of the Case

Herbert Sperling was convicted on Count One of an indictment charging him and seventeen others with conspiracy to violate the narcotics laws in violation of Title

21, United States Code, Section 846 and on Count Two charging Sperling with organizing and supervising a continuing criminal narcotics enterprise in violation of Title 21, United States Code, Section 848. Sperling appealed from an order and judgment by Honorable Milton Pollock, United States District Judge resentencing him on Count One to a term of thirty years imprisonment and a $50,000 fine, to run concurrently with the previously imposed life sentence and $100,000 fine on Count Two, pursuant to the directions of this Court in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

The panel's majority vacated the sentence on Count One, reasoning that Sperling's conviction on the conspiracy count, under the facts of this case, constituted a lesser included offense of his conviction on Count Two, the continuing criminal narcotics enterprise count, and that since the Double Jeopardy clause foreclosed multiple punishments for the same offense, the separate sentence on the lesser offense could not stand. The Court left unaffected Sperling's conviction on Count One. In support of this procedure of vacating the sentence, the panel's majority cited cases involving multiple punishments under 18 U.S.C. § 2113(a) and (d). (Slip op. 4156 n.13).

Judge Van Graafeiland's dissent reasoned that the conspiracy count and the continuing criminal narcotics enterprise count were not "the same in law and in fact" and that, therefore, separate sentences could be imposed on each without offending the Double Jeopardy clause.

Subsequent to the panel's decision, on June 14, 1977, the United States Supreme Court assumed *arguendo* that a narcotics conspiracy under 21 U.S.C. § 846 was a lesser included offense of a continuing criminal narcotics enterprise under 21 U.S.C. § 848. *United States* v. *Jeffers*, 45 U.S.L.W. 4691 (U.S., June 14, 1977). The Supreme

Court further indicated that Jeffers, who had received a life sentence without parole and $100,000 fine under § 848 to run consecutive with a sentence of 15 years and a $25,000 fine on the conspiracy charge, was entitled to have the combined $125,000 fine lowered to $100,000 so that there would be no multiple punishment. However, unlike the remedy afforded to Sperling by this Court, the Supreme Court permitted Jeffers' consecutive terms of imprisonment to stand, finding no "possibility of cumulative punishment" since the prisoner would not be eligible for parole at any time. (45 U.S.L.W. 4696, n. 24).

Reasons For This Petition

The panel's 2-to-1 decision in this case should be reheard for several reasons.

First, Herbert Sperling is a major violator of the criminal narcotics laws who may at some later date successfully attack his conviction on Count Two and thereby win his freedom. In vacating the sentence on Count One, the Court did not consider whether, in the event that the Count Two conviction were to be overturned, the sentence on Count One could be reinstated. However, it requires no prescience to forecast that a later effort to reinstate the sentence on Count One would meet a substantial claim of Double Jeopardy. See *United States* v. *Corson*, 449 F.2d 544, 550 (3d Cir. 1971). Should Sperling later succeed in overturning his conviction on Count Two and a sentence on Count One cannot be reinstated, the result would be "an overall miscarriage of justice." *McMillen* v. *United States*, 386 F.2d 29, 37 (1st Cir. 1967), *cert. denied*, 390 U.S. 163 (1968).

Second, although in the face of the Supreme Court's decision in *Jeffers* the Government no longer contends that Section 846 is not a lesser included offense of Section 848,

we believe that *Jeffers* demonstrates that this Court mistakenly concluded that Sperling's concurrent sentence under Section 846 had to be vacated in order to satisfy the Double Jeopardy clause. In *Jeffers*, the Supreme Court let stand the defendant's *consecutive* sentences on his convictions under §§ 846 and 848 because as a practical matter they would be served concurrently. We respectfully submit that the Supreme Court's decision, which is binding on this Court, requires that Sperling's concurrent sentences should likewise stand.

Third, this Court's decision to vacate Sperling's concurrent sentence relied exclusively on cases decided under the Bank Robbery Act, 18 U.S.C. § 2113. However, a careful review of the cases decided under that statute reveals that they are not based on Double Jeopardy considerations and they do not control here. Moreover, there is no legal or practical justification for vacating concurrent sentences to satisfy the Double Jeopardy clause's prohibition against cumulative punishment.

Finally, even if this Court decides not to reinstate Sperling's concurrent sentence on Count One, to prevent a later miscarriage of justice, this Court should remand the cause to permit the District Court to impose a general sentence on both convictions.

ARGUMENT

POINT I

The Concurrent Sentence On Count One Should Be Reinstated Since It Does Not Constitute Cumulative Punishment In Violation of the Double Jeopardy Clause.

This case presents a rare instance in which the United States Supreme Court decided the precise issue considered by a panel of the Second Circuit only days after the issuance of the Second Circuit opinion. The panel majority's opinion was in total accord with the subsequent Supreme Court's determination that, for purposes of the Double Jeopardy clause, § 846 was a lesser included offense of § 848. However, the Supreme Court proceeded to meet the problem of cumulative punishment by vacating a cumulative fine but allowing to stand prison terms that would be served concurrently. Putting aside for a moment the rationale for this remedy, we believe that this Court is governed by the Supreme Court's action in a decision which is on all fours with Sperling's case and, accordingly, Sperling's concurrent sentence must be reinstated.

Although the Supreme Court cited no case law in determining the appropriate remedy in *Jeffers*, in vacating the concurrent sentence, the panel majority cited three cases under the Bank Robbery Act, 18 U.S.C. § 2113. We respectfully submit that reliance on those cases was misplaced. This can be seen by a review of the case law vacating concurrent sentences under § 2113.

The starting point for this analysis is *United States* v. *Prince*, 352 U.S. 322 (1957) which first held that imposition of consecutive sentences on both subsections 2113 (a) and (d) was not authorized. However, in *Prince* the Supreme Court did not mention the Double Jeopardy

clause. Instead, *Prince* reasoned that neither the statute nor the Congressional intent permitted the imposition of separate sentences for violations of subsections of the Bank Robbery Act absent a clear Congressional intent to permit pyramiding of sentences. This rationale was quickly extended by virtually every circuit to cover concurrent sentences imposed under Section 2113 for the same robbery.

Examination of the cases which extended *Prince* to concurrent sentences, including the first such Second Circuit case, *United States* v. *Tarricone*, 242 F.2d 555 (2d Cir. 1957), discloses no reason for the application of the same remedy here. Most of the cases applied *Prince* to concurrent sentences without mention of the Double Jeopardy clause.* In only few instances, did certain

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* *United States* v. *Gaddis*, 424 U.S. 544, 549 n.12 (1976); *Green* v. *United States*, 365 U.S. 301 (1961); D.C. Circuit: *United States* v. *Hopkins*, 464 F.2d 816 (D.C. Cir. 1972); Second Circuit: *United States* v. *Oliver*, 523 F.2d 253 (2d Cir. 1975); *United States* v. *Stewart*, 513 F.2d 957 (2d Cir. 1975); *United States* v. *Provato*, 505 F.2d 703 (2d Cir. 1974); *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972); *United States* v. *Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States* v. *DiCanio*, 245 F.2d 713 (2d Cir. 1957); *United States* v. *Nirenberg*, 242 F.2d 632 (2d Cir.), *cert. denied*, 354 U.S. 941 (1957); *United States* v. *Tarricone*, 242 F.2d (2d Cir 1957); Third Circuit: *United States* v. *Welty*, 426 F.2d 615 (3d Cir. 1970); *United States* v. *Conway*, 415 F.2d 158 (3d Cir: 1969), *cert. denied*, 397 U.S. 994 (1970); *United States* v. *Chester*, 407 F.2d 533 (3d Cir.), *cert. denied*, 394 U.S. 1020 (1969); Fourth Circuit: *United States* v. *Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States* v. *Brown*, 443 F.2d 1174 (4th Cir. 1971); *United States* v. *Spears*, 442 F.2d 424 (4th Cir. 1971); *United States* v. *Retolaza*, 398 F.2d 235 (4th Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); Fifth Circuit: *United States* v. *Hicks*, 524 F.2d 1001 (5th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976); *Goodman* v. *United States*, 511 F.2d 706 (5th Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States* v. *Vasquez*, 504 F.2d 555 (5th Cir. 1974); *Sullivan*

[Footnote continued on following page]

courts even discuss the Double Jeopardy clause when applying *Prince* to concurrent sentences.* The Second Circuit, in line with most other courts has never, prior to

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v. *United States*, 485 F.2d 1352 (5th Cir. 1973); *United States* v. *Davila-Nater*, 474 F.2d 270 (5th Cir. 1973); *United States* v. *Forrester*, 456 F.2d 905 (5th Cir. 1972), *cert. denied*, 409 U.S. 856 (1972); *Burger* v. *United States*, 454 F.2d 723 (5th Cir. 1972); *Rose* v. *United States*, 448 F.2d 389 (5th Cir. 1971); *United States* v. *Foy*, 441 F.2d 398 (5th Cir. 1971); *United States* v. *White*, 440 F.2d 978 (5th Cir.), *cert. denied*, 404 U.S. 839 (1971); *United States* v. *White*, 436 F.2d 1380 (5th Cir. 1971); *Eakes* v. *United States*, 391 F.2d 287 (5th Cir. 1968); *Williamson* v. *United States*, 265 F.2d 236 (5th Cir. 1959); Seventh Circuit: *United States* v. *Fleming*, 504 F.2d 1045 (7th Cir. 1974); *United States* v. *Foster*, 440 F.2d 390 (7th Cir. 1971); *United States* v. *Gardner*, 347 F.2d 405 (7th Cir. 1965); *United States* v. *Trumblay*, 286 F.2d 918 (7th Cir. 1961); *United States* v. *Leather*, 271 F.2d 80 (7th Cir. 1959); *United States* v. *Drake*, 250 F.2d 216 (7th Cir. 1957); Eighth Circuit: *United States* v. *Pietras*, 501 F.2d 182 (8th Cir.), *cert. denied*, 419 U.S. 1071 (1974); *Jones* v. *United States*, 396 F.2d 66 (8th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); *Hardy* v. *United States*, 292 F.2d 192 (8th Cir. 1961); *Kitts* v. *United States*, 243 F.2d 883 (8th Cir. 1957); Ninth Circuit: *United States* v. *Parsons*, 452 F.2d 1007 (9th Cir. 1971); *Bayless* v. *United States*, 347 F.2d 354 (9th Cir. 1965); Tenth Circuit: *United States* v. *Davis*, 544 F.2d 1056 (10th Cir. 1976); *United States* v. *Leyba*, 504 F.2d 441 (10th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); *Purdom* v. *United States*, 249 F.2d 822 (10th Cir. 1957), *cert. denied*, 355 U.S. 913 (1958); District Court: *United States* v. *Bennett*, 408 F. Supp. 974 (S.D. Fla. 1976), aff'd, 547 F.2d 1235 (5th Cir. 1977); *Matlock* v. *United States* 309 F. Supp. 398 (W.D. Tenn. 1970); *Spears* v. *United States*, 392 F. Supp. (E.D.N.Y. 1974).

* *Wright* v. *United States*, 519 F.2d 13 (7th Cir.), *cert. denied*, 423 U.S. 932 (1975); *United States* v. *Canty*, 469 F.2d 114 (D.C. Cir., 1972); *United States* v. *Von Roeder*, 435 F.2d 1104 (10th Cir.), *cert. denied sub nom. Gonzales* v. *United States*, 403 U.S. 934 (1971); *Clermont* v. *United States*, 432 F.2d 1215 (9th Cir. 1970), *cert. denied*, 402 U.S. 997 (1971); *United States* v. *McKenzie*, 414 F.2d 808 (3rd Cir. 1969), *cert. denied sub nom. Arthur* v. *United States*, 396 U.S. 1019 (1970); *Holland* v. *United States*, 384 F.2d 370 (5th Cir. 1967); *United States* v. *Machibroda*, 338 F.2d 947 (6th Cir. 1964); *United States* v. *Green*, 274 F.2d 59 (1st Cir. 1960); *Audett* v. *United States*, 265 F.2d (9th Cir. 1959).

this case, suggested that double jeopardy considerations underpinned the need to vacate concurrent sentences imposed under § 2113.

As to the few courts which imported references to the Double Jeopardy clause in vacating concurrent sentences under § 2113, we submit that those opinions, which overlooked the fact that *Prince* was not founded on the Double Jeopardy clause, were ill-considered. Those cases articulated one essential reason why, under the Double Jeopardy clause, concurrent sentences should not stand. Namely, they assume that the defendant's opportunities for pardon or parole would be harmed by concurrent sentences. This argument, occasionally referred to as if it were indisputable, originates in a case which asserts the alleged danger but cited no authority. *Hibdon* v. *United States*, 204 F.2d 834 (6th Cir. 1953); see *United States* v. *Machibroda*, 338 F.2d 947 (6 Cir. 1964). There is, in fact, no basis for finding that concurrent sentences adversely affect parole opportunities, as several courts have correctly noted. *E.g.*, *Clark* v. *United States*, 267 F.2d 99 (4th Cir. 1959); *McMillen* v. *United States*, 386 F.2d 29 (1st Cir. 1967) (citing 18 United States Code, § 4202; United States Probation Officers' Manual, Chapter VII). See also *Bayless* v. *United States*, 347 F.2d 354 (9th Cir. 1965); *Campbell* v. *United States*, 269 F.2d 688 (1st Cir. 1959). The new Parole Policy Guidelines which will take effect shortly confirm that the existence of a concurrent sentence has no effect on eligibility for parole or the possibility that parole will be granted. 42 Fed. Reg. 121 p. 3176 § 2.20 (June 23, 1977). Instead, the Parole Commission will consider for eligibility only the greater offense and for granting parole only the type of conduct involved. Existing Parole Guidelines are to the same effect. 28 C.F.R. §§ 2.2; 2.18-2.20. Similarly, eligibility for pardon is unaffected under the Executive Clemency guidelines by concurrent sentences. 28 C.F.R. §§ 1.1-1.9.

Thus in view of both the incorrectness and inapplicability of cases decided under § 2113, it is apparent that there is no legal precedent for vacating Sperling's concurrent sentence under Section 846. Moreover, there is no rationale founded in considerations under the Double Jeopardy clause for vacating concurrent sentences. The reason for forbidding cumulative sentences on both greater and lesser charges is the same as prohibiting separate trials: the Double Jeopardy clause bars multiple trials for the same offense. *Brown* v. *Ohio*, 45 U.S.L.W. 4697 (June 16, 1977). However, it is equally plain that where there is no threat of successive prosecutions, the Double Jeopardy clause is not offended. *United States* v. *Wilson*, 420 U.S. 332 (1975). Thus, in all cases a defendant can be prosecuted *at the same trial for both* the lesser and greater offenses. But cf. *O'Clair* v. *United States*, 470 F.2d 1199 (1st Cir. 1972). In determining what constitutes multiple punishment as prohibited by the Double Jeopardy clause, *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), it follows that the imposition of concurrent sentences (not affecting the opportunities for parole) does not offend the Double Jeopardy clause. In such circumstances, the concurrent sentences are not in any sense cumulative, and the cases cited by *Sperling* in footnote 13 are not to the contrary.

POINT II

If the Court Does Not Reinstate the Sentence on Count One, the Court Should Remand to Permit the District Court to Impose One General Life Sentence.

If the Court determines not to reinstate the sentence on Count One, the Government urges the Court to remand to permit the District Court to impose one general life sentence on Counts One and Two. This suggestion derives from *Gorman* v. *United States*, *supra*, 456 F.2d at 1259

n. 1, where this Court approved the practice of imposing one general sentence under Section 2113 up to the maximum allowed by the greater count. Accord, *United States* v. *Corson*, 449 F.2d 544 (3d Cir. 1971); *Hall* v. *United States*, 356 F.2d 424, 426 (5th Cir. 1966); *Clark* v. *United States*, 267 F.2d 99 (4th Cir. 1959). See *Lynch* v. *United States*, 364 F.2d 313 (9th Cir. 1966) (general sentence upheld when defendant was charged with violating Sections 2113(a) and (d) in one count); *Choice* v. *United States*, 415 F. Supp. 369 (E.D. Pa. 1976). But cf., *United States* v. *Jones*, 397 F. Supp. 312 (E.D.N.Y. 1975) (where Judge Dooling indicated that a general sentence within maximum for the greater offense could be illegal as to the lesser offenses). Use of this procedure in this case will insure that a successful attack on Count Two would not result in Sperling's immediate release, but, rather, would result in his being resentenced to the maximum penalty under Count One. See *Pugliese* v. *United States*, 353 F.2d 514 (1st Cir. 1965).

CONCLUSION

Wherefore, the petition for rehearing should be granted.

Respectfully submitted,

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That on the 27th day of July, 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

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